UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 05-2929
(Case No. 03-C-885 (E.D. Wis.))

JOSEPH ECKSTEIN,

Petitioner-Appellant,

v.

GARY R. McCAUGHTRY, Warden,
Waupun Correctional Institution,

Respondent-Appellee.

Appeal From A Final Judgment
Denying Petition For Writ Of Habeas Corpus
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable William E. Callahan, Presiding

BRIEF AND APPENDIX OF PETITIONER-APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel for the appellant, Joseph Eckstein, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) The party represented is Joseph Eckstein

(2) Law firms which have represented the party in this matter:

Henak Law Office, S.C.

Attorneys and law firms which have represented the party in related, state-court matters:

Boyle, Boyle & Smith, S.C.

Charles R. Koehn Law Offices

(3)(i) N/A

(3)(ii) N/A

Dated: _____

_____
Robert R. Henak

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BRIEF OF PETITIONER-APPELLANT

JURISDICTIONAL STATEMENT

Joseph Eckstein appeals from the final judgement entered by the district court on June 3, 2005, denying Eckstein's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The case was heard and decided in that Court by a Magistrate Judge, the parties having consented to such jurisdiction pursuant to 28 U.S.C. §636(c) and General Local Rule 73.1 (E.D. Wis.). Eckstein consented in writing to jurisdiction by the magistrate judge on September 24, 2003. Mr. McCaughtry consented in writing to jurisdiction by the magistrate judge on October 14, 2003.

The Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §§1291 & 2253.

Eckstein filed his notice of appeal on June 27, 2005. By Order dated June 28,

2005, the District Court granted his motion for a certificate of appealability on the issues raised in this brief.

There are no prior or related federal appellate proceedings in this case.

This is a collateral attack on Eckstein's criminal conviction in Wisconsin state court. His place of custody is Waupun Correctional Institution, 200 S. Madison St., Waupun, WI 53963-0351. His current custodian is Phillip A. Kingston, Warden, Waupun Correctional Institution.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Eckstein was denied the effective assistance of trial counsel due to counsel's failure to:

> a. seek suppression or exclusion of the audiotape Eckstein made of his conversation with Crystal Graham on September 3, 1998, during which conversation he is alleged to have solicited or conspired with Graham to kill his wife, Annamaria; and
>
> b. impeach Graham's testimony at trial based upon her admitted mental and emotional difficulties which, among other things, interfered with her ability accurately to recall and relate facts while under stress.

Included within this issue is the subsidiary issue of whether the District Court erred in denying Eckstein's request to expand the record to include exhibits admitted into evidence in the state court and that are relevant to the issues raised here.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Procedural History of the Case

On May 25, 1999, the Brown County Circuit Court, Hon. William C. Griesbach, presiding, sentenced Joseph Eckstein to a total of 40 years imprisonment (R6:Exh.A).[1] Eckstein previously was convicted following a non-jury trial of one count of conspiracy to commit first-degree intentional homicide and one count of solicitation to commit that offense (R6:Exhs. L & M).

The charges in this case were based on the state's allegation, disputed by Eckstein, that Eckstein entered into an agreement with Crystal Graham (or rather, thought he had entered into an agreement with her), under which she would kill his estranged wife, Annamaria, for $10,000. Graham, it turned out, was working with the police, and Eckstein was arrested on September 3, 1998, minutes after their meeting discussing the alleged agreement. Eckstein's position, on the other hand, was that, although he agreed with Graham to plant drugs on his wife, he never agreed to have her killed.

The primary evidence against Eckstein at trial consisted of Graham's testimony regarding their conversations, and a tape recording Eckstein had made of their conversations on September 3 1998, which recording was seized from Eckstein's

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[1] Throughout this brief, several abbreviations are used pursuant to Fed. R. App. P. 28(e). Documents in the record are identified by the District Court docket sheet number as "R___"; the following ":___" reference denotes the exhibit ("Exh.") or page number of the document.

When the document is reproduced in the attached or separate appendix, the applicable appendix page number is also identified as "App. ___."

truck sometime after his arrest. Due to problems with their recording equipment, police efforts to record the conversations of September 2 and 3, 1998, by use of a body wire resulted only in garbled recordings with large periods of the conversations missing.

Trial counsel for Eckstein, Jonathan Smith and Gerald Boyle, filed a post-conviction motion and direct appeal raising sufficiency of the evidence, double jeopardy, and sentencing issues (R6:Exh.I). The Wisconsin Court of Appeals affirmed in a decision dated July 25, 2000, *see State v. Joseph Eckstein*, Appeal No. 00-0117-CR (R6:Exh. G), and the Wisconsin Supreme Court subsequently denied review on October 17, 2000 (R6:Exh. H).

Eckstein retained new counsel and, on December 10, 2001, filed a motion for post-conviction relief pursuant to Wis. Stat. §974.06 on the grounds that trial counsel were ineffective (1) for not seeking suppression or exclusion of Eckstein's tape recording of the September 3, 1998 conversation with Graham, and (2) for neither examining Graham regarding her history of emotional problems that could have interfered with her ability accurately to recollect their discussions nor seeking access to her mental health records regarding those emotional problems (R14:Exh. 2).

Following evidentiary hearings on January 22, 2002, and June 28, 2002 (R6:Exhs. N & O), briefing (R14:Exhs. 3 & 4), and argument on July 26, 2002 (R6:Exh. P), the circuit court, Hon. Richard G. Greenwood, Circuit Court Reserve Judge, presiding, issued a written decision denying the motion on August 28, 2002

(R6:Exh.D:App.2-18). The circuit court then entered a written Order reflecting that result on September 18, 2002 (R6:Exh.D:App.1).

On May 28, 2003, the Wisconsin Court of Appeals affirmed (R6:Exh.B; App. 28-37).

By motion submitted June 6, 2003, Eckstein sought reconsideration on the grounds that the Court of Appeals relied upon a factually inaccurate transcription of a tape recording in the record. Specifically, the purported transcript claims that Eckstein made reference to "murder[ing]" his wife in her garage (R6:Exh.E:App.115), while the tape itself does not reflect that he said that. The term actually used, as reflected in the tapes themselves, Trial Exhibits 13 and 14A, was "load" or something similar (R14:Exh.5).[2] By Order dated June 12, 2003, the Court of Appeals summarily denied the motion (R14:Exh.6; App. 38).

On August 13, 2003, the Wisconsin Supreme Court denied Mr. Eckstein's timely-filed petition for review which again raised the same ineffectiveness claims raised in the Court of Appeals (R6:Exh.C; App. 27; *see* R14:Exh.7).

On September 11, 2003, Eckstein filed his habeas petition alleging denial of the effective assistance of counsel based on the same claims raised in his §974.06 motion and appeal (R1). The District Court ordered a response on September 12, 2003 (R3; App. 25-26). The parties consented to jurisdiction by the Magistrate Judge

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[2] While Eckstein moved the District Court for an Order directing the state to supplement the record with the trial and post-conviction hearing exhibits, including these (R14; R20), that court denied the motion, deeming the evidence before the trial court "irrelevant" to the issues presented (R22:3-5; App. 21-23).

(R4; R5).

The state filed its response (R6), and the parties briefed the issues raised (R2; R8; R10; R12; R17). On January 14. 2004, Eckstein moved the court to expand the record to include additional documents and exhibits from the state court record which had been excluded from the state's response but were necessary to a fair adjudication of his petition (R14). On March 2, 2004, the court granted the request to the extent that it allowed expansion of the record to include the documents attached to Eckstein's motion. However, it denied that part of the motion seeking to include certain exhibits from the trial and post-conviction motion hearings in state court, deeming those exhibits "irrelevant." (R22; App. 19-24).

By Decision and Order entered June 1, 2005, the court, Honorable William E. Callahan, Jr., United States Magistrate Judge, denied Eckstein's habeas petition (R23; App. 2-16). The court entered judgment on June 3, 2005 (R24; App. 1).

Trial Evidence

The state post-conviction hearing judge summarized the state's theory and evidence at trial as follows:

> The state's theory in this case is that some time in April or May, 1998, the defendant was in the process of going through an acrimonious divorce from his wife, Annamaria. The defendant had a net marital asset value of approximately 1.3 million dollars. Annamaria had been instrumental in having the defendant jailed over a weekend and accordingly the defendant was motivated to seek some sort of reprisal or relief from his wife's conduct. The state alleged that some time in the spring of 1998, around April or May, that the defendant was in the

company of another woman, Delores Wuhrman. Delores Wuhrman had another friend, Crystal Graham, who the defendant allegedly solicited to help him in alleviating the problems he was having with his wife, Annamaria. The state alleged that the defendant asked Crystal Graham if she would assist him in getting rid of Annamaria and she told him that she would do that for $25,000.

Subsequently the state contended that Crystal Graham contacted her son at the hospital for convicted sexual predators to arrange the demise of Annamaria. The state also contended that there were other contacts between the defendant and Crystal Graham and that at one point is [sic] was suggested that in an attempt to put her away in a state prison for two years that Crystal Graham or her agents plant drugs in the car of Annamaria. The state also contended that in addition to the aforementioned discussions about disposing of Annamaria, that the suggestion was made that Crystal Graham personally do away with her by using Molotov cocktails. These events transpired in the spring and early summer of 1998 and then were renewed some time around the end of August 1998 when Crystal returned from a lengthy trip during the summer to the West Coast.

The state alleged that near the end of August, 1998, the defendant and Crystal took up conversations again and in an attempt to become current and find out how the plans were proceeding, the defendant offered to meet Crystal Graham at Preble Park. However, on or about September 1, 1998, Crystal Graham went to the Green Bay Police Department and told them of the situation. At this time the Green Bay Police Department decided to use a wire device to transcribe the proposed meeting of the defendant and Graham at Preble Part on September 2, 1992 [sic 1998]. On September 2, 1998, Crystal Graham met the defendant who arrived in a large white Lincoln and they discussed the overall situation. At that time there were two sets of tapes [sic, recording devices] in the Lincoln. Eckstein had placed his own set of tapes [sic, recorder] in the Lincoln and the Green Bay Police Department had wired Crystal for reception with their own. Neither of these tapes appeared to be useful or discernable.

A second meeting was held at Preble Park the very following day on September 3, 1998, and this time Crystal met the defendant at about 10:00 a.m. in the morning. She arrived on her bicycle and he arriving in his blue truck. Once again Crystal was wired by the police department and once again Eckstein had placed his own micro-cassette

> tape [sic, recorder] in the back of the vehicle just behind the passenger side. This meeting was under the surveillance of the Green Bay Police Department and initially they had had trouble in hearing the radio transmissions. However, upon a change in position by one of the officers, he was able to pick part of the conversation up from the police wiring. This tape of the conversation between the defendant and Crystal was recorded by the Green Bay Police Department and transcribed by the police department and admitted into evidence at the trial as state's Exhibit 13 and 15. Exhibit 13 is the police tape and Exhibit 15 is the transcription of the police tape.
>
> After hearing the conversation during the meeting of the defendant and Crystal, the police decided to arrest the defendant and take him into custody after Crystal departed on her bicycle. This was done a short distance from Preble Park on Finger Road. . . .

(R6:Exh.D:App.5-7).

Because of significant problems with the police recording of the meeting on September 3, 1998, Trial Exhibit 13,[3] resulting from the inability to transmit and record several portions of the conversation, Eckstein's trial counsel had retained an expert to review that tape and took the position that it was not admissible, or at least of no probative value (R6:Exh.L:9-11). The state sought to avoid these problems with its tape by admitting and playing Eckstein's recording of the same conversation, Trial Exhibit 14A (*see* Exh.M:3-5, 10-14).[4] Although admitted into evidence (R6:Exh.M:14), the state's tape was not played at trial.

With the exception of the limited corroboration provided by the tape recordings

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[3] The District Court denied Eckstein's motion to include this exhibit in the record, deeming it "irrelevant" (R22:3-5; App. 21-23).

[4] The District Court denied Eckstein's motion to include this exhibit in the record, deeming it "irrelevant" (R22:3-5; App. 21-23).

of the conversations on September 2 and 3, 1998, the state's case and theory of Eckstein's involvement consisted almost exclusively of the allegations of Crystal Graham (*see* R6:Exh.L:22-136).

Eckstein's account at trial regarding what had transpired was quite different from Graham's (R6:Exh.M:33-80). Eckstein explained that one time during April or May, 1998, he, Wurhman, and Graham were discussing Annamaria's burglary of his home, false allegations resulting in restraining orders, and other harassment when Graham offered to take care of that for him. He did not know what she meant by that, but agreed to her help. (R6:Exh.M:35-37).

Only later did Eckstein learn that she had contacted her son, who suggested three options for Annamaria: plant drugs on her, take her out of the country, or kill her. Eckstein responded that killing her was out of the question, but agreed to Graham's plan to plant drugs on Annamaria so she would be arrested. (R6:Exh.M:38-39).

When Graham was unable to follow through, and subsequently left for the West Coast the end of June, Eckstein considered the matter closed. He did not hear from Graham again until she called him on August 27, 1998, soon after Wuhrman and Eckstein had broken up. They discussed that relationship and, at the end of the conversation, Graham made a comment to the effect that she was still working on a plan for Annamaria. Eckstein did not believe her, given her prior failure (R6:Exh.M:40-41, 66-67).

Eckstein next heard from Graham on September 2, 1998. He had been trying to contact her for help in putting together an inventory for the divorce proceeding of items Annamaria had taken from his house. He wanted Graham to be a witness on these issues. On September 2, 1998, she returned his call regarding testifying and then suddenly and unexpectedly asked if Eckstein "still want[ed] Annamaria hurt." (R6:Exh.M:42-44, 66-67).

Eckstein was surprised and very suspicious of this offer. He assumed that she was referring again to planting drugs on Annamaria, as that was their original plan, but he had viewed that matter closed for over two months. Because she was acting so strangely, he decided to meet with her in person and to take along his tape recorder. (R6:Exh.M:44).

Eckstein explained that, from his perspective, the meetings on September 2 and 3, 1998, concerned the same plan as before, i.e., to plant drugs on Annamaria. He explained that he did not want any physical harm to come to her, although he and Graham did discuss means of self-defense should she get caught. Given Graham's obesity and other health problems, as well as her general incompetence and the "wild stories" she told to excuse her failure to plant drugs on Annamaria in June, Eckstein never believed that Graham could or would actually kill anyone. He just went along with some of her crazier statements about killing Annamaria because he knew she would never do it. (R6:Exh.M:46-58).

SUMMARY OF ARGUMENT

Joseph Eckstein appeals from denial of his federal habeas petition under 28 U.S.C. §2254. That petition claimed violation of Eckstein's right to the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

The District Court erred in concluding that Eckstein is not entitled to habeas relief. The state court decisions on these points were not merely wrong, but unreasonably so.

Trial counsel acted unreasonably in (1) failing to seek suppression or exclusion of Eckstein's tape of the September 3, 1998 meeting and (2) failing to use Graham's admitted mental and emotional disabilities to impeach her claims at trial. The circuit court agreed counsel's failures regarding the tape were unreasonable, and the state Court of Appeals chose not to address that matter. While the state courts concluded that trial counsel did not act unreasonably in failing to use Graham's disabilities to impeach her, that conclusion was both wrong and patently unreasonable.

On the issue of resulting prejudice, the state appellate court's finding that counsels' errors did not prejudice his defense is directly contrary to controlling Supreme Court authority. The state court required Eckstein to show not just a reasonable probability of a different result but for counsel's errors, but that the errors also rendered the trial results "unreliable."

Even if the state court had not applied an improper standard for assessing

resulting prejudice, that court's conclusion that Eckstein was not prejudiced by his attorneys' errors is so unreasonable or arbitrary as to permit habeas relief nonetheless.

Finally, the District Court abused its discretion by refusing to direct expansion of the record to include exhibits admitted into evidence at the state court trial, thereby denying Eckstein a reasonable opportunity to prove that the state court's assessment of resulting prejudice was based on an unreasonable finding of fact.

ARGUMENT

TRIAL COUNSELS' UNREASONABLE ACTS AND OMISSIONS PREJUDICED ECKSTEIN'S DEFENSE, DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL, AND ENTITLE HIM TO HABEAS RELIEF

Joseph Eckstein is being held in violation of the Constitution of the United States because his conviction in Wisconsin state court resulted from the violation of his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments. Specifically, Eckstein was denied the effective assistance of trial counsel due to counsels':

> a. failure to seek suppression or exclusion of the audiotape Eckstein made of his conversation with Crystal Graham on September 3, 1998, during which conversation he is alleged to have solicited or conspired with Graham to kill his wife, Annamaria; and
>
> b. failure to impeach Graham's testimony at trial based upon her admitted mental and emotional difficulties which, among other things, interfered with her ability accurately to recall and relate facts while under stress.

Even under the restrictive requirements of the Antiterrorism and Effective

Death Penalty Act of 1996, relief is appropriate where, as here, the defendant's custody results from the violation of his constitutional rights and the state court decisions are both contrary to controlling federal law and palpably unreasonable. *E.g.*, *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997).

A. Standard of Review

The substantive legal standards are settled. A defendant alleging ineffective assistance of trial counsel first must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). A defendant thus must rebut the presumption of attorney competence "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), *citing Strickland*, 466 U.S. at 688-89. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id*., *citing Strickland*, 466 U.S. at 689. Moreover, in analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *see Kimmelman*, 477 U.S. at 384.

It is not necessary, of course, to demonstrate total incompetence of counsel. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective

assistance of counsel. . . may in a particular case be violated by even an isolated error. . . if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight or inattention rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001).

Second, a defendant must show that counsel's deficient performance prejudiced his or her defense. A counsel's performance prejudices the defense when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The defendant is not required, however, to show "that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693; *see Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, the question on review is "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Reasonable probability," under this standard, is defined as a "probability sufficient to undermine confidence in the outcome." *Id.* If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362 (2000).

In assessing resulting prejudice, the Court must consider the totality of the circumstances. *Strickland*, 466 U.S. at 695. The Court thus must assess the

cumulative effect of *all* errors, and may not merely review the effect of each in isolation. *E.g.*, *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000). Prejudice does not depend on whether the particular fact-finder at the original trial would have decided the matter differently but for counsel's errors, but whether the errors could have affected the decision of a reasonable trier of fact. *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985); *see Strickland*, 466 U.S. at 695.

Demonstrating a prejudicial constitutional violation is not alone sufficient for habeas relief, however. The question of whether a constitutional violation mandates or permits habeas relief is controlled by 28 U.S.C. §2254(d). As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"), 28 U.S.C. §2254(d) provides that a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits

> unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

This Court has explained the applicable legal standards under the AEDPA as follows:

> A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that reached by the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) [footnote omitted]. An "unreasonable application" of Supreme Court precedent occurs when "the state court identifies the correct governing legal rule ... but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407; see also *Jackson v. Miller*, No. 98-3736 2001 WL 884814 (7th Cir. Aug. 8, 2001). We review a state court decision de novo to determine whether it was "contrary to" Supreme Court precedent; however, we defer to reasonable state court decisions. *See Ouska v. Cahill-Masching*, 246 F.3d 1036, 1044 (7th Cir.2001).

Dixon v. Snyder, 266 F.3d 693, 700 (7th Cir. 2001).

This Court has construed this provision as requiring *de novo* review only of purely legal questions to determine if the state court cited the correct Supreme Court precedents, and "reasonableness" review regarding application of that precedent to the particular facts of the case:

> Under these new standards, our review of state courts' legal determinations continues to be *de novo*. So, too, does our review of mixed questions of law and fact. [Citations omitted]. Under the AEDPA, however, we must answer the more subtle question of whether the state court "unreasonably" applied clearly established federal law as the Supreme Court has determined it. *Pitsonbarger v. Gramley*, 103 F.3d 1293, 1297-98 (7th Cir. 1996).

Hall v. Washington, 106 F.3d 742, 748 (7th Cir. 1997). The *Hall* Court went on to hold, however, that the reasonableness standard is not a toothless one:

> The statutory "unreasonableness" standard allows the state court's

> conclusion to stand if it is one of several equally plausible outcomes. On the other hand, Congress would not have used the word "unreasonable" if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue.

Id. at 748-49. "Unreasonableness is judged by an objective standard." *Morgan v. Krenke*, 232 F.3d 562, 565 (7th Cir. 2000), *cert. denied*, 532 U.S. 951 (2001).

Finally, however, this Court has made clear that the restrictive provisions of the AEDPA apply *only* to matters actually decided on the merits by the state court. Matters which the state court did not decide on the merits are reviewed *de novo*. *Dixon*, 266 F.3d at 701, 702; *see Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir.), *reh'g denied*, 108 F.3d 144 (7th Cir. 1997).

The district court's application of those standards is reviewed *de novo*. *Washington v. Smith*, 219 F.3d 620, 626 (7th Cir. 2000) (citation omitted).

B. Factual Background for Specific Claims

1. Eckstein's tape of September 3, 1998

According to police reports admitted as exhibits at the state post-conviction hearing,[5] the Green Bay Police Department impounded Eckstein's pickup truck on September 3, 1998, following his arrest at about 10:30 a.m. During a custodial inspection of the truck later that morning at the tow lot, Detectives Argall and Klika observed a microcassette recorder containing a microcassette tape in the rear seat area.

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[5] The District Court denied Eckstein's motion to include these exhibits in the record, deeming them irrelevant (R22:3-5; App. 21-23).

These items were catalogued on the Vehicle Custodial Inspection sheet along with numerous other items. Argall and Klika did not listen to the tape as part of their custodial inspection.

Later that day, Lieutenant Urban instructed Detective Darm to seize the recorder and tape from the truck, along with a pair of white work gloves that also were observed during the custodial inspection. (R6:Exh.N:28-29, 33-34, 44). While Darm assumed that Urban instructed him to take these items because they had some evidentiary significance, (*id.*:33-34), neither Darm's reports, nor his testimony disclose why Lieutenant Urban thought these items should be seized. The record also is silent as to what reasons, if any, Lieutenant Urban may have had for believing that these items had evidentiary significance. Darm himself had not been involved in Eckstein's arrest, had received little information, if any, about the circumstances of Eckstein's arrest, and had not received any information from any source that Eckstein was taping his conversations with Crystal Graham. (R6:Exh.N:37-39, 43-44).

As requested, Darm seized the items from the truck that night some time between 7:45 and 8:15 p.m. (R6:Exh.N:49). After seizing the tape, he rewound it a little bit and listened to it. According to Darm he heard traffic noises and Eckstein's voice, but could not recall anything of significance about the portion of tape he listened to. (*Id.*:49-50). Darm and Buenning both testified that they never listened to the entire September 3 tape recording by Eckstein until March, perhaps during trial, after a technician copying the tape discovered the September 3 conversation. (*Id.*:53-

54, 69-70).

Shortly before Darm seized the items from Eckstein's truck, he had searched Eckstein's Lincoln, which was parked at Eckstein's home, also at Lieutenant Urban's direction. Darm seized a number of items from the Lincoln, including a surfer wig and a folder entitled "disability." When asked why these items had been seized, Darm only could say that he took them because he "thought [they] might have some relevancy to the case." (R6:Exh.N:46).

Prior to trial, Attorney's Boyle and Smith were informed both of the audiotape recordings made by the police and of those made by Eckstein of the meetings with Graham on September 2 and 3, 1998. They sought disclosure of those tapes, were provided copies of the state's tapes, and Smith was allowed to listen to a copy of Eckstein's tape from September 2, 1998. However, the tape provided to Smith as a complete copy of Eckstein's recording did not have a recording of the conversation on September 3, 1998. (R6:Exh.M:3-4; R6:Exh.O:24-27). According to Attorney Boyle, the defense was misled into believing that Eckstein's recording of September 3, 1998, simply did not work, and they did not learn otherwise until midtrial, when the state sought admission of that tape. (R6:Exh.M:4; R6:Exh.O:8, 10).

The fact that much of the state's recording of Eckstein's conversation with Graham on September 3, 1998 was virtually indecipherable formed a central part of the defense case going into the trial. (R6:Exh.M:3-5). Attorneys Boyle and Smith well understood that the tapes of the meetings on September 2 and 3, 1998 constituted

the most critical evidence against Eckstein, even going to the extent of hiring an expert to analyze the state's tapes in support of a possible motion to exclude those tapes. (*See* R6:Exh.M:3-4).

Yet, while Boyle acknowledged the damaging effect of the admission of Eckstein's tape of September 3, 1998, on his defense, and his desire to exclude it if he could, he explained at trial his belief that there was no legal basis for its exclusion (R6:Exh.M:5).[6] During the post-conviction motion hearing, Boyle reaffirmed that the reason he did not seek to suppress or exclude Eckstein's tape of September 3, 1998, was simply because he could think of no basis to do so. (R6:Exh.O:4-5; R6:Exh.O:10-11).

2. Graham's mental and emotional disabilities

It was clear from the preliminary examination before Court Commissioner Lawrence L. Gazeley on September 11, 1998, that Crystal Graham suffered from significant mental problems which interfered with her ability accurately to observe, recall and relate facts. The court early on in that hearing expressed its concerns regarding the unresponsive and disjointed nature of her testimony. (R14:Exh.1:15-16). Graham admitted that she was very depressed throughout the relevant time period (*id.*:37-39), and indeed had clinical manic depression all of her life (*id.*:65), that she was under a doctor's care for manic depression and post-traumatic stress

[6] When Eckstein's tape was played, Mr. Boyle stated: "For all the purposes that I stated earlier, Judge, I'm not interposing an objection at this time." (R6:Exh.M:13).

disorder at the time of the alleged offenses (*id.*:55-56), and that she had problems remembering in stressful situations or when she was not taking her medications (*id.*:56-57). She also admitted that she was on a number of medications at the time, including Prozac, Zantac, Estrol (ph.) and lithium. (*Id.*:78).

Although trial counsel had received and reviewed the preliminary hearing transcript highlighting Graham's mental and emotional problems prior to trial (R6:Exh.O:15), they failed to elicit at trial the mental disabilities conceded by her during that hearing.

During the post-conviction motion hearing, Attorney Boyle testified that he had reviewed Graham's preliminary hearing testimony prior to trial and was well aware that she was "extraordinarily dysfunctional" (R6:Exh.O:16). However, he chose not to use those facts in cross-examining Graham at trial because other evidence tended to corroborate parts of her story:

> If -- If there was no corroboration of her testimony other than her word, I think it might be relevant. . . . I don't see any way, any way whatsoever whether or not she was anything other than psychotic, that any inquiry into her mental state would have made any difference whatsoever . . ..

(R6:Exh.O:16).

3. Circuit court ruling on post-conviction motion

Following two evidentiary hearings, briefing, and oral argument (R14:Exhs.3 & 4; R6:Exhs.N-P), the circuit court denied Eckstein's §974.06 motion in a written

decision on August 28, 2002 (R6:Exh.D:App.2-18).

Regarding trial counsel's failure to seek access to Graham's mental health records or to use her history of emotional and mental problems to discredit her testimony at trial, the circuit court credited trial counsel's testimony that he did not find such matters to be relevant given the corroboration of portions of her testimony by the police and the tapes. Based in part on the belief that the trial court would have had access to the preliminary hearing transcript of Graham's testimony, the post-conviction court concluded that the trial court had sufficient grounds on which to assess her credibility at trial:

> . . . I am satisfied that the defense raises an interesting issue regarding whether or not counsel should have asked for a *Shiffra* hearing, but it is a close question, particularly when viewed in light of the fact that the court had access of the transcript of the preliminary examination and the court was aware of her problems with her memory under stressful situations by virtue of her testimony at the trial in the state's case in chief. I am convinced that defense counsel's explanation as to why he didn't go further and seek all of her medical records in a *Shiffra* hearing is a sufficient and valid reason for his conduct and I am disinclined to find his conduct deficient or ineffective because of the additional fact that the trial court had the witness in person before him, under oath, subject to direct and cross-examination, and that the court was in a position to effectively evaluate her credibility.

(R6:Exh.D:App.14-15).

However, that court held that Eckstein's trial counsel had acted unreasonably in not seeking suppression or exclusion of Eckstein's tape of the September 3, 1998 meeting (R6:Exh.D:App.10-13). The Court summarized its findings as follows:

> I agree with the defendant's argument that defense counsel was deficient in failing to challenge the seizure of the Eckstein tape

> recorded September 3, 1998, from his truck and the search of it that occurred through listening to it. This tape was seized without a search warrant and it was not seized incident to a lawful arrest. The tape and recorder in this case were in the back seat of Eckstein's private truck and inaccessible to others. This being a warrantless search, it was the obligation on the state to prove that the search fell within some established exception to the warrant requirement. In this case the state could not do that. This search was neither pursuant to the defendant's consent, justified by exigent circumstances, or incident to the defendant's arrest. Moreover, the state is unable to establish that the search is supported by the automobile exception under the facts of this case. In this case listening to the tape was not part of a reasonable and valid inventory search.

(R6:Exh.D:App.10-11). The court found as facts that the police were not engaged in an inventory function when they searched the tape by listening to it, and that the record was silent as to any reasons which might provide probable cause for searching the tape. Accordingly, the warrantless search of the tape could not be justified under either the inventory search, automobile search, or inevitable discovery exceptions to the warrant requirement. (R6:Exh.D:App.11-13).

Having found deficiency based on the failure to seek suppression on constitutional grounds, the post-conviction court did not address whether trial counsel also acted unreasonably in failing to seek exclusion under Wis. Stat. §971.23(7m) (R6:Exh.D:App.13).

Despite having found deficient performance regarding trial counsel's failure to seek suppression of Eckstein's tape of the September 3, 1998 meeting, the post-conviction court nonetheless denied Eckstein relief on the grounds that trial counsel's errors did not prejudice Eckstein's right to a fair trial. While acknowledging the

direct conflict between the testimony of Graham and Eckstein regarding whether the original and continued plan involved the murder of Annamaria or merely the planting of drugs, and that "[c]ertainly the credibility of Graham and Eckstein were crucial to the ultimate fact finding in this case," the court concluded that the result would not have been different absent the corroboration provided by Eckstein's tape. (R6:Exh.D:App.15-17).

4. State Court of Appeals decision

On appeal, the Wisconsin Court of Appeals concluded that the circuit court did not erroneously find that Boyle's failure to cross-examine Graham regarding her mental and emotional condition was "a strategic trial decision." (R6:Exh.B:7). Based on this finding, the Court also concluded that trial counsel's performance was not deficient in this regard. (*Id.*) The Court further held that any deficiency in this regard was not prejudicial in any event. (*Id.*)

Regarding admission of Eckstein's tape recording, the Court of Appeals did not address whether trial counsels' failure to seek suppression or exclusion of that tape was deficient. (R6:Exh.B:8). Rather, the Court held that "Eckstein was not prejudiced because there is no evidence the conviction was unreliable." (*Id.*; *see* Exh.B:8-10). The Court concluded that

> even without Eckstein's recording there is enough evidence in the police recordings to corroborate Graham's testimony and allow a reasonable fact-finder to determine that Eckstein did indeed wish to have his wife killed. Consequently, Eckstein suffered no prejudice.

(R6:Exh.B:10).

5. The District Court Decision

The District Court similarly denied Eckstein's ineffectiveness claims (R23; App. 2-16). The court deemed reasonable the state Court of Appeals' conclusion that trial counsel's conduct regarding Ms. Graham was neither deficient nor prejudicial (R23:6-9; App. 7-10). The district court also held that the Wisconsin Court of Appeals did not act unreasonably in concluding that trial counsel's failure to seek suppression or exclusion of Eckstein's tape of the September 3 conversation did not prejudice Eckstein's case at trial (R23:9-15; App. 10-16). Specifically, the court held that "Eckstein has failed to demonstrate that, but for counsels' failure to have Eckstein's copy of the conversation suppressed, Eckstain probably would not have been convicted . . .." (R23:14; App. 15).

Also on the issue of resulting prejudice, the court held that the state court's decision was not contrary to the requirements of *Strickland*, even though the state court had identified the controlling consideration as being whether counsel's mistakes rendered the conviction "unreliable" rather than *Strickland's* controlling standard of whether there exists a reasonable probability of a different result but for the errors (R23:4-6; App. 5-7).

C. Eckstein Was Denied the Effective Assistance of Counsel and Is Entitled to Habeas Relief

Applying the appropriate legal standards, the state courts' findings that

Eckstein's trial counsel provided effective assistance of counsel were both contrary to established federal law and "involved an unreasonable application of clearly established Federal law" as determined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The state court decisions on Eckstein's ineffectiveness claims were not "one of several equally plausible outcomes." *Hall*, 106 F.3d at 748-49. Rather, those decisions were, at best, seriously at tension with governing Supreme Court precedents, inadequately supported by the record, and arbitrary, thus mandating issuance of the writ despite the AEDPA amendments. *Id.* at 749.

1. The Identified Failures of Counsel Were Unreasonable and Thus "Deficient Performance"

a. Failure to seek suppression or exclusion of Eckstein's tape

The state circuit court concluded that trial counsel's failure to seek suppression or exclusion of Eckstein's tape of the September 3, 1998 meeting was deficient performance (R6:Exh.D:App.10-14), and the state did not seriously dispute that conclusion in the Court of Appeals. Instead, it merely relegated to a footnote the summary assertions that the warrantless seizure of the tape might have been supported by the automobile exception and that it should not have to bear its burden of showing good cause under Wis. Stat. §971.23(7m) for its failure to disclose the tape until mid-trial. (R6:Exh.E:10 n.4).

The state's failure to pursue that issue in the Wisconsin Court of Appeals beyond a summary reference in a footnote to its brief constituted an abandonment or

waiver under Wisconsin law. *E.g.*, *State v. Santana-Lopez*, 2000 WI App. 122, ¶6 n.4, 237 Wis.2d 332, 613 N.W.2d 918, 922 n.4 ("'We do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review'" (citations omitted)). *See also United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (government's failure properly to argue harmlessness constitutes waiver). Indeed, the state's intent to abandon its "automobile exception" argument is further reflected in the fact that it never even suggested in its response to Eckstein's Petition for Review to the Wisconsin Supreme Court that the circuit court was wrong (R14:Exh.8).

In any event, the state circuit court was correct that trial counsel's failure to seek suppression or exclusion of the evidence was deficient performance. For the reasons stated by that court, Eckstein's tape would have been suppressed had trial counsel sought suppression (R6:Exh.D:App.10-11).

The state below did not dispute that, although Eckstein had been arrested and his truck seized, he retained a reasonable expectation of privacy in the micro-cassette contained in the recorder in his back seat, such that a warrant was required in order for the police validly to search that tape by playing it. *E.g.*, *Walter v. United States*, 447 U.S. 649, 654 (1980) (plurality opinion) (although FBI had lawful possession of boxes containing videotapes, they had no authority to search the contents of those tapes without a valid warrant); *id.* at 660 (White & Brennan, concurring); *see Arizona v. Hicks*, 480 U.S. 321 (1987) (physically handling electronic equipment to discover

otherwise concealed information constitutes separate search which, unless within scope of officers' original justification for entering dwelling, required independent legal basis because of additional privacy interest invaded); *United States v. Turk*, 526 F.2d 654, 666 (5th Cir. 1976) (warrantless playing of audio tape unconstitutional even though initial seizure of tape from defendant's car was valid). The tape and recorder were in the back seat of Eckstein's private truck, inaccessible to others. *Compare State v. Weber*, 163 Wis.2d 116, 471 N.W.2d 187, 198-99 (1991) (defendant had no reasonable expectation of privacy in contents of audiotape he left, ready to play, in the stereo system of an unlocked car left in a hospital parking lot).

"The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), overruled on other grounds, *Mapp v. Ohio*, 367 U.S. 643 (1961). Given the constitutional preference for assessment of probable cause by a neutral and detached magistrate, warrantless searches are "per se" unreasonable, subject to only a few limited exceptions. *See Katz v. United States*, 389 U.S. 347, 357 (1967). The state has the burden of proving by clear and convincing evidence that a warrantless search was reasonable and in compliance with constitutional requirements. *State v. Kieffer*, 217 Wis.2d 531, 577 N.W.2d 352, 357 (1998).

The search of Eckstein's tape was conducted without a warrant. Upon a proper objection, therefore, the obligation would have been on the state to prove that the

search fell within some established exception to the warrant requirement. As the post-conviction court held, however, the state failed to carry that burden (R6:Exh.D:App.10-13).

Had trial counsel acted reasonably, the evidence likewise would have been excluded as a sanction for the state's discovery violation in failing to make a copy of Eckstein's recording of the September 3, 1998 conversation available for copying and inspection prior to trial. Pursuant to Wis. Stat. §971.23(1)(a), (e) & (g), the state must comply with defense counsel's request to produce for inspection "[a]ny written or recorded statement concerning the alleged crime made by the defendant," and the recordings of any such statement by a trial witness, as well as "[a]ny physical evidence that the district attorney intends to offer in evidence at the trial." The purpose of these provisions, like that of other disclosure requirements under this statute is "'[t]o promote the ascertainment of truth in trial by requiring timely pretrial discovery,' and '[t]o save court time in trial and avoid the necessity for frequent interruptions and postponements.'" *State v. Revels*, 221 Wis.2d 315, 585 N.W.2d 602, 609 (Ct. App. 1998) (citation omitted).

Pursuant to Wis. Stat. §971.23(7m)(a), "[t]he court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply." "If good cause is not shown, the statute is mandatory -- the evidence *shall* be excluded." *State v. Wild*, 146 Wis.2d 18, 429 N.W.2d 105, 108 (Ct. App. 1988) (Citation omitted; emphasis in original); *see*

State v. DeLao, 2002 WI 49, ¶51, 252 Wis.2d 289, 643 N.W.2d 480.

"Good cause" requires that the prosecutor made a good faith effort to comply with the statute. *See Wild,* 429 N.W.2d at 109. However, "good faith" alone is insufficient. *DeLao*, ¶¶53-58. A prosecutor's failure to understand the statutory requirements of disclosure, or his unexplained failure to comply with them, does not constitute "good cause." *Swonger v. State*, 54 Wis.2d 468, 195 N.W.2d 598, 601 (1972) ("[A] mistaken interpretation of the requirements of the statute, or even total lack of awareness of the existence of the statute is insufficient to constitute 'good cause'" (citation omitted)). Nor does negligence or an absence of bad faith. *DeLao*, ¶¶54-55; *State v. Martinez*, 166 Wis.2d 250, 479 N.W.2d 224, 228-29 (Ct. App. 1991). "The burden of proving good cause rests on the State." *DeLao*, ¶51.

The state has never suggested any "good cause" for its failure to comply with its obligations to produce the evidence for inspection or copying prior to trial. Even at the oral argument on Eckstein's §974.06 motion, it failed to do so, instead admitting that it could only "speculat[e]" why the recording was not disclosed (R6:Exh.P:41 ("Why Attorney Smith didn't get a chance to listen to [the tape] is speculation at this point")). Under these authorities, therefore, the trial court would have had no option -- the absence of any "good cause" for the state's failure would have required exclusion of the evidence upon a proper motion.

Attorney Boyle's statements at trial, moreover, demonstrate that he either was unfamiliar with the requirements of §971.23(7m) or merely overlooked them in this

particular case. There certainly is no indication that he made a strategic decision not to object on these grounds, and there exists no possible basis on which such a decision could be deemed reasonable in any event. As previously indicated, deficient performance is shown where counsels' failures are the result of oversight rather than a reasoned defense strategy. *E.g.*, *Wiggins*, *supra*; *Dixon*, 266 F.3d at 703.

b. Failure to use Graham's admitted disabilities at trial

Far from a rational trial strategy, trial counsel's failure to use Crystal Graham's known mental disabilities at trial was wholly irrational under any standard.

It is true that the Court must not second-guess counsel's considered selection of trial tactics or the exercise of his or her professional judgment. *State v. Felton*, 110 Wis.2d 485, 329 N.W.2d 161, 169 (1983). It is insufficient, however, merely to label counsel's failure as "trial strategy," as did the state courts. Even tactics "must stand the scrutiny of common sense." *Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984); *see Felton*, 329 N.W.2d at 169. A reviewing court thus "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than judgment." *Felton*, 329 N.W.2d at 169. *See also Washington v. Smith*, 219 F.3d 620, 629-32 (7th Cir. 2000).

Graham was the *only* witness to attribute to Eckstein an intent to kill his wife, the only state witness to detail the supposed conspiracy, and the only state witness directly involved in the conversations with Eckstein in late August and early

September, 1998. Her testimony thus was critical to "setting the stage" by which the true meaning of the taped conversations and Eckstein's intent would be judged.

A reasonable attorney in trial counsels' position thus would have recognized that Graham's credibility was critical to the state's case. Given her preliminary hearing testimony, moreover, it was clear that Graham suffered from serious mental and emotional problems which directly interfered with her ability accurately to recall and relate facts, especially when, as here, she was under stress. It is no stretch of the imagination to conclude that the same problems likewise would affect her ability accurately to understand and observe what is going on around her in times of stress such as she was experiencing throughout the period of this alleged conspiracy.

There exists no rational strategic or tactical basis for not raising at trial Graham's admitted mental disabilities and their affect on her abilities accurately to observe, recall and relate facts. It certainly is not rational to suggest, as Attorney Boyle and the state courts did, that impeachment of Graham was somehow unnecessary because portions of her testimony were corroborated by other evidence. It is the rare case in which the testimony of the state's star witness is wholly without some corroboration. To hold, as the state courts and the district court did here, that counsel is excused from the constitutional obligation to subject the state's case to adversarial testing merely because portions of that case are corroborated would wholly emasculate the right to effective assistance of counsel at trial.

Attorney Boyles' claim, moreover, is amply rebutted by his own lengthy

attempt to cross-examine and impeach Graham on other, less effective issues (R6:Exh.L:64-132), and his direct attack on her credibility in closing argument at the trial. Contrary to Attorney Boyle's post-conviction suggestion that impeaching Graham's credibility would have been inappropriate, unnecessary, or even counterproductive, he found it appropriate in closing argument (albeit without the evidence from the preliminary examination to support it) to assert that she was wrong or lying:

> And I think that you have to judge her character and her credibility on the totality of her conduct and on how she testified in court. And in fact, she lied. She didn't have answers or she didn't have answers [sic]. She lied about what she knew and what she didn't know. She lied about facts, clearly her son did not back her up.
>
> * * *
>
> So I ask you, Judge, to consider the arguments that I have made. I don't want to belabor the point. I know this–you were listening to the testimony that when certain things were being said, you were writing notes, so I know that you picked up on some of the nuances that I was hopefully trying to establish, but there was some conflict in her testimony. Ms. Graham lied. She wanted to remember things when she couldn't remember or didn't have to remember them or chose not to remember them.

(R6:Exh.M:88, 97).

The conclusion that trial counsel somehow acted reasonably in failing to elicit the effects of Graham's acknowledged mental and emotional problems at trial thus is not only wrong; it is wholly unreasonable. No rational defense strategy, and certainly not that which trial counsel sought to present here, would incorporate concealment from the fact-finder of facts significantly impeaching the state's most critical witness.

2. Counsels' deficient conduct prejudiced Eckstein's right to a fair trial

While either of counsels' errors alone resulted in sufficient prejudice for reversal, ineffectiveness of counsel must be assessed under the totality of the circumstances. It is thus the cumulative effect of counsel's errors that is controlling. *E.g.*, *Alvarez,* 225 F.3d at 824; *Washington v. Smith*, 219 F.3d at 634-35. Here, the cumulative effect of counsels' errors is that Eckstein was denied a fair trial. Absent Eckstein's tape of September 3, 1998, the state would have been left without significant corroboration of Graham's story, while evidence of her significant mental problems would have enhanced substantially her existing credibility issues. The combined effect would have been devastating to the state's case.

While the tapes of the conversations on September 2 and 3, 1998 formed the core of the prosecution's case, the meaning of the words uttered on those tapes was open to dispute. Graham claimed that they were all directed at an ongoing agreement to kill Annamaria, and the state emphasized that the tapes must be construed in light of "the original plan" to kill Annamaria. (R6:Exh.M:100). Eckstein, on the other hand, testified that he had no intention of killing his wife and was just playing along with Graham's odd and unexpected assertions of August and early September, 1998, to see what this crazy lady was up to (R6:Exh.M:44-58)..

Eckstein's testimony was corroborated by the fact that there would have been no rational purpose in tape-recording the conversations had he really intended to have his wife killed. It was further corroborated by the fact that evidence at trial reflected

that Graham was very overweight and suffered from either an arthritic condition or carpal tunnel syndrome which made it difficult to lift anything heavy (R6:Exh.M:58). As noted by Attorney Boyle in closing, the idea that Graham would be in a position to kill Annamaria given her mental and physical problems is just laughable. (R6:Exh.M:93). Given the ample evidence that Eckstein is very hard of hearing (*e.g.*, Exh.L:11-12), moreover, there also can be no guaranty that he even heard many of the more damning statements made by Graham on the tapes and relied upon by the state at trial.

Under these circumstances, the post-conviction court was correct in observing that the relative credibility of Graham and Eckstein was "crucial to the ultimate fact finding in this case" (R6:Exh.D:App.16). Defense counsels' failure to use available evidence showing Graham's problems with reality easily could have affected the outcome of this case. The error skewed in favor of the state the assessment of relative credibility central to the determination whether the state proved Eckstein's actual intent beyond a reasonable doubt.

Limited evidence at trial that Graham was under a doctor's care and taking medication for depression (R6:Exh.L:23) does not, as the state courts suggested, even approximate the true nature and effect of her mental problems on her ability accurately to observe, recall and relate facts.[7] Graham was not simply depressed. Her

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[7] The sum total of the evidence presented at trial regarding the effect of Graham's mental problems on her ability accurately to remember and relate facts was disclosed during *direct examination* as follows:

(continued...)

preliminary examination testimony disclosed that she suffered from clinical manic depression all of her life (R14:Exh.1:65), that she was under a doctor's care for both manic depression and post-traumatic stress disorder (*id.*:55-56), and that, as a result of her mental problems, she had problems remembering in stressful situations or when she was not taking her medications (*id.*:56-57). She was not merely taking some medication for her mental problems; she was taking Prozac and lithium, among others (*id.*:78).

The failure to object on proper grounds to admission of Eckstein's tape of the September 3, 1998, conversation had even a more direct and devastating impact on the outcome of this case. The state acknowledged that it would have significant problems in the case absent what it termed the "very clear and very convincing corroboration" provided by the tape. (R6:Exh.M:81-82). The trial court similarly held that Graham's story was "hard to imagine" absent the taped corroboration

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[7](...continued)

Q Are you presently under a doctor's care?

A Yes, I am.

Q And do you take prescribed medications?

A Yes, I do.

Q And what is the nature of the medications that you take?

A For clinical depression.

Q And how long have you been taking that type of medication?

A About ten years.

(R6:Exh.L:23).

(*id.*:104). A proper objection, however, would have resulted in suppression or exclusion of that corroboration deemed essential to conviction.

The prejudice of playing Eckstein's tape was not mitigated by the partial tape made by police. The trial court's view of the relative credibility of Graham's and Eckstein's testimony necessarily was tainted by Eckstein's tape and the absence of the evidence of Graham's emotional problems. Although the state's tape of September 3, 1998, was in evidence, there is no suggestion the trial court ever listened to it, or that it had any effect on the verdict. Even if it had, the court's interpretation of the effect of the limited portions of the conversation reflected on the state's tape necessarily would have been skewed by what it already had heard on Eckstein's.

The state Court of Appeals' suggestion that the state's tape of the September 2, 1998 meeting (Trial Exhibit 12) alone renders admission of Eckstein's tape of September 3 harmless is wholly meritless (R6:Exh.B:8-10; App. 35-37). The state's September 2, 1998 tape is fully consistent with Eckstein's testimony that the plan they were discussing was the same as before, *i.e.*, to plant drugs on Annamaria, and that any discussion about physically harming anyone came, at least from his perspective, only in the context of self-protection should Graham be caught planting the drugs. The conversation began with Eckstein insisting on a plan for planting the drugs:

> JE: because, ya know, I'll tell you how it was, ya know, the last time I don't feel you had a plan and, ya know, there were many other stories about people or how to get caught with the drugs and all that, ya know, I don't, ya know, I think you have to understand my point too, ya know . . .

(R6:Exh.E:App.109 (Trial Exhibit 10:9)). The conversation then proceeded to the dangers of Graham getting caught or of Annamaria having a bodyguard and the resulting need for self-defense. Eckstein explained that a Molotov cocktail might not work in that circumstance and that Graham should consider other options for self-defense.

> CG: Well i[f] I lose my life, I lose it, ya know.
>
> JE: No, no, no. There's a chance of, ya know, the bottle not hitting hard enough, not breaking or whatever, ya know, you do it. She has somebody, ah, being a bodyguard or watching for her and, ya know, you're nailed right away and, ya know, the other thing doesn't really work great, ya know, the first time you do it, ya know. Of course there's other things to do, I mean, just so, ya know (undiscernible), ya know . . .

(R6:Exh.E:App.109 (Trial Exhibit 10:9)).

The remainder of that conversation likewise is consistent with the "job" being a continuation of the original plan to plant drugs while being prepared to act in self-defense if necessary. There would be the same need for an alibi when the "job" is planting drugs as there would be for a murder. There likewise would be the same need for "deniability" regarding whatever means Graham may have chosen for self-protection should something have gone wrong, even though the two had not agreed to physically hurt Annamaria.

The conversation regarding Graham getting a car further corroborates rather than rebuts Eckstein's account that the intent was not to physically harm Annamaria. Eckstein expressly notes his concern that using a car while carrying out the plan could

allow Annamaria to track her down afterwards:

> JE: . . . I don't know if you really want a car because if you do anything with the car because she could trace you down possibly then.

(Exh.E:App.114 (Trial Exhibit 10:14)). Of course, if the plan was to kill Annamaria, Eckstein would not have been concerned about her tracking down Graham after execution of that plan.

The tape also corroborates Eckstein in that his concern for completing all his paperwork for the divorce case and being in town for a deposition the following weekend make sense only if Annamaria will still be alive.

While Eckstein mentions at one point having fantasized about waiting inside a refrigerator box and "zap[ping]" his wife (R6:Exh.E:App.113 (Trial Exhibit 10:13)), a reasonable jury easily could find from his tone of voice and the likely impossibility that someone in Graham's physical condition could accomplish such a trick (*see* R6:Exh.M:58), that this was merely an aside and not a serious suggestion on how Graham should proceed.

The state court's suggestion that the September 2, 1998 tape somehow mandated conviction thus simply is wrong. The meaning of the words uttered on that tape turn entirely upon the background of what happened before and the relative credibility of Graham and Eckstein.

As for the September 3, 1998 recording, the state Court of Appeals relied upon the partial transcript from the defective police recording (Trial Exhibit 15) and once

again suggest that this transcript alone renders trial counsel's deficient performance harmless. (R6:Exh.B:9-10; App. 36-37). It does not.

Only two references in the state's tape, as reflected in the "transcript" of that tape, suggest that the plan is to kill Annamaria rather than to plant drugs. The first is the reference to loading her into a car and burying her in a cornfield (R6:Exh.E:App.115 (Trial Exhibit 15:5)).[8] Especially absent the background conversation missing from the state's tape that day, a reasonable fact-finder could have concluded from the virtual impossibility of Graham accomplishing any such thing given her severe mental and physical problems that the suggestion of her obtaining a car in this manner was not serious.

The only other reference in that transcript to killing Annamaria is Graham's final assertion that she was "planning on killing Annamaria this weekend" (R6:Exh.E:App.116 (Trial Exhibit 15:6)). Once again, given the absence of the background for this statement missing from the state's tape, a reasonable fact-finder could have concluded that Eckstein's noncommittal response, "Yeah. Okay," reflected not agreement, but disbelief, especially in light of Graham's mental and physical disabilities which would render such action highly unlikely. A reasonable fact-finder likewise could find, given the evidence of Eckstein's hearing problems, (*e.g.*, R6:Exh.L:11-12), that he simply did not hear clearly what Graham had said.

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[8] As discussed in Section D,3, *infra*, the transcript is inaccurate in its use of the term "murder" (R6:Exh.E:App.115 (Trial Exhibit 15:5)). The term actually used, as reflected in the tape itself (which the state chose to withhold from this Court), was "load" or something similar (*see, e.g.*, R14:Exh.5).

Contrary to the District Court's conclusion, therefore, it is not the case here that a reasonable fact-finder necessarily would have convicted even if Eckstein's trial counsel acted reasonably. Even with Eckstein's tape in evidence, mere words are not enough for conviction. Rather, the fact-finder must make an inference beyond a reasonable doubt that he in fact intended that his wife be killed. On this point, the evidence was directly in conflict, with Graham testifying concerning prior, unrecorded conversations in which, she asserted, Eckstein stated his desire that his wife be killed, and Eckstein testifying to the contrary and explaining that his recorded statements merely reflected his attempts to see what this crazy lady was up to. The central issue of Eckstein's intent, therefore rested squarely upon the relative credibility of Graham and Eckstein and, on that point, there can be no reasonable dispute that withholding of evidence of Graham's severe mental disabilities easily could have skewed a reasonable fact-finder's evaluation of the evidence.

The District Court's suggestion that Eckstein must prove that he probably would not have been convicted but for counsel's deficient performance, and that he did not do so by showing that a reasonable fact-finder could have found a reasonable doubt (R23:14), reflects a misunderstanding of *Strickland's* prejudice prong. Contrary to the District Court's apparent belief, the issue is not whether the fact-finder could have convicted but for the attorney's mistakes, but whether there is a reasonable probability that it would not have done so. Eckstein is not, in other words, required to prove that it is more likely than not that he would have been acquitted. *Strickland*,

466 U.S. at 693.

Because there is a reasonable probability of a different result but for trial counsel's errors, Eckstein's right to a fair trial was prejudiced by those errors.

D. The AEDPA Does Not Bar Relief

Because trial counsel acted unreasonably in not seeking suppression or exclusion of Eckstein's tape and in not using Graham's known psychological problems, and because such actions would have damaged the state's case, providing a reasonable probability of a different result, Eckstein was denied the effective assistance of counsel. The state court's decision denying him relief was both contrary to and an unreasonable application of controlling Supreme Court authority reflected in *Strickland* and its progeny.

Because the state Court of Appeals neither addressed nor decided whether trial counsels' failure to seek suppression or exclusion of Eckstein's tape was deficient performance, review of that issue is *de novo*. *Dixon*, 266 F.3d at 701, 702.

1. The state courts acted unreasonably in concluding trial counsel acted reasonably in not using evidence of Graham's mental and emotional problems

As explained in Section C,1,b, *supra*, the state Court of Appeals' suggestion that trial counsel acted reasonably in failing to confront Graham with her mental and emotional disabilities fails to withstand rational scrutiny. There exists no rational strategic or tactical basis for not raising at trial Graham's admitted mental disabilities

and their effect on her abilities accurately to observe, recall and relate facts.

If nothing else, the fact that Boyle himself found it necessary and appropriate to cross-examine Graham at length on other, less effective issues (R6:Exh.L:64-132), and to argue in his closing (albeit without the evidence from the preliminary examination to support it) that she was wrong or lying, (R6:Exh.M:88, 97), rebuts any claim that his failure to use stronger impeachment material as well was due to anything but oversight.

The state Court of Appeals' suggestion that Attorney Boyle's failure to cross-examine Graham on her mental and emotional problems was somehow a reasonable strategic decision thus is wholly unreasonable. The AEDPA accordingly does not bar relief here. *See* 28 U.S.C. §2254(d)(1).

2. The state court's decision that Eckstein was not prejudiced by trial counsels' deficient performance was both unreasonable and contrary to controlling Supreme Court authority

a. The state court decision on Eckstein's §974.06 appeal is contrary to clearly established federal law as determined by the Supreme Court regarding the necessary showing of prejudice

"It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams v. Taylor*, 529 U.S. 362, 391 (2000). While purporting to apply the Supreme Court's *Strickland* standard for ineffectiveness, the Wisconsin Court of Appeals on Eckstein's §974.06 appeal in fact did not. The District Court's conclusion to the contrary is just wrong (R23:4-6; App. 5-7). In responding to Eckstein's petition for

review, the state conceded as much. (*See* R14:Exh.8:4).

Specifically, in assessing whether Eckstein was prejudiced by the two claims of ineffectiveness, the Wisconsin Court of Appeals placed the burden on Eckstein to prove, not merely a reasonable probability of a different result, but that the alleged errors of counsel rendered his trial "unreliable."

In summarizing the applicable standard of review, that court properly noted that ineffectiveness of counsel generally requires both deficient performance and resulting prejudice. (R6:Exh.B:5). It further stated that, "[t]o satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable." (*Id.*, citing *Strickland*, 466 U.S. at 687). While correct as far as it goes, this general summary omits the fact that prejudice turns, not on some abstract inquiry into the "fairness" or "reliability" of the proceedings, but on whether there exists a reasonable probability of a different result but for counsel's errors. *E.g.*, *Williams v. Taylor*, 529 U.S. 362 (2000).

The state court, moreover, applied *only* its abstract "reliability" standard, without assessing the likelihood of a different result but for trial counsel's unreasonable failure to seek suppression or exclusion of Eckstein's tape:

> We conclude that Eckstein was not prejudiced because there is no evidence the conviction was unreliable.

(R6:Exh.B:8). At no time did that court assess whether there was a reasonable likelihood of a different result but for counsel's errors regarding the tape. Indeed, the standard actually reflected in that court's decision is exactly the opposite: whether

there is a reasonable likelihood that the verdict would have been the same but for the errors:

> ¶24 Eckstein claims the meaning of his words on the tape are "open to dispute," that he only agreed to plant drugs on his wife, and he was only going along with Graham because he thought she would not actually do anything. *However, a fact-finder could determine that the police recordings indicate otherwise*. . . .
>
> ¶25 *Thus, even without Eckstein's recording there is enough evidence in the police recordings to corroborate Graham's testimony and allow a reasonable fact-finder to determine that Eckstein did indeed wish to have his wife killed. Consequently, Eckstein suffered no prejudice.*

(R6:Exh.B:10 (emphasis added)).

The state court's decision thus was directly contrary to controlling Supreme Court precedent. A conclusion that the fact-finder still might have reached the same verdict but-for trial counsel's errors is exactly the wrong standard for assessing prejudice. The Supreme Court in *Strickland*, and more recently in *Williams*, defined the proper question when assessing resulting prejudice as whether there would have been a "reasonable probability of a different result" but for counsel's errors. *Williams*, 529 U.S. at 391; *Strickland*, 466 U.S. at 694. Contrary to the state court's decision, therefore, the defendant is not required under *Strickland* to show "that counsel's deficient conduct more likely than not altered the outcome of the case," *Strickland*, 466 U.S. at 693, or that the errors *also* undermined the fairness or reliability of the proceedings. *See Williams*, *supra*. Indeed, the Supreme Court in *Williams* expressly rejected as "contrary to" *Strickland* exactly the type of analysis

applied by the state court here. 529 U.S. at 391-95.

See also Washington v. Smith, 219 F.3d 620, 632-33 (7th Cir. 2000) (granting federal habeas relief because Wisconsin Court of Appeals "reliability" standard for prejudice (the same standard applied here) was not only unreasonable in light of *Strickland* and *Williams* but directly contrary to those decisions).

Because the Wisconsin Court of Appeals' decision on the direct appeal in this case applied a standard for prejudice which contradicts the Supreme Court's holdings in *Strickland* and *Williams*, that decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court . . .." Because application of the proper standard establishes violation of Eckstein's right to the effective assistance of counsel, *see* Section C, *supra*, habeas relief is appropriate. *See, e.g.*, *Williams*, 529 U.S. at 391-95 (state court decision requiring more than "reasonable probability of a different result" to establish prejudice was "contrary to" *Strickland*); *Washington v. Smith*, 219 F.3d at 632-33 (Wisconsin court's application of improper prejudice standard was contrary to *Strickland*; application of proper standard mandated habeas relief).

b. The state court's decision that Eckstein was not prejudiced by trial counsels' deficient performance was an unreasonable application of *Strickland*

For the same reasons already stated, *see* Section C,2, *supra*, the state courts' decision that Attorney Boyle's errors were not prejudicial, was not merely wrong, but "involved an unreasonable application of" federal law as reflected in *Strickland* and other Supreme Court decisions. 28 U.S.C. §2254(d)(1). As this Court has held,

reasonableness review must be taken seriously because, "[i]n the absence of *some* review, trial courts would be able to disregard even the most powerful evidence with impunity." *Hall*, 106 F.3d at 752. That court's assessment of prejudice is not "one of several equally plausible outcomes;" rather, it is "so inadequately supported by the record, or so arbitrary, that a writ must issue." *Id.* at 748-49.

3. The district court abused its discretion in denying Eckstein expansion of the record to include trial exhibits which could demonstrate that the state court's decision was based on an unreasonable finding of fact

Eckstein explained in the District Court that, in reaching its conclusion that Eckstein was not prejudiced by trial counsels' deficient performance, the state Court of Appeals erroneously relied upon the assertion that Eckstein made explicit reference to "murder[ing]" his wife. (R10:30-31; *see* R6:Exh.B:9-10; App. 36-37). Eckstein made no such statement, and the state court's assumption to the contrary was wholly unreasonable given the evidence presented. This error itself would authorize relief despite the AEDPA. *See* 28 U.S.C. §2254(d)(2) (habeas relief authorized where the state decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding")..

Specifically, the state Court of Appeals rests its "no prejudice" holding on misstatements in the "transcript" of the defective police tape of the conversation on September 3, 1998. The Court quotes from the transcript regarding a hypothetical attributed to Eckstein about how Graham could get a car and then concludes that there is no prejudice because "[t]here is nothing ambiguous or open to dispute about

Eckstein's statement to 'murder her in the garage.'" (R6:Exh.B:9-10; App. 36-37).

Overlooked by that court, however, is the fact that the transcript is inaccurate in its use of the term "murder" (R6:Exh.E:App.115). The term actually used, as reflected in the tape itself, was "load" or something similar (*see* R14:5). Exactly what was said, and more importantly, what was meant by that exchange is certainly open to dispute.

Eckstein argued below that the state court's decision was based on an unreasonable finding of fact and sought to expand the record in the District Court to include the actual tapes admitted into evidence at the trial to establish that fact (R10:30-31; R14). While the actual tape would have demonstrated that the transcript, and thus the state court decision, was inaccurate, the state opposed the motion (R18), and the District Court denied it on the grounds the trial exhibits would be irrelevant to whether Eckstein was denied the effective assistance of counsel and was entitled to relief (R22:3-5; App. 21-23).

This Court reviews the district court's decision not to expand the record for an abuse of discretion. *Levine v. Torvik*, 986 F.2d 1506, 1517 (6th Cir.1993).

The District Court abused its discretion in denying expansion of the record to include the tapes admitted into evidence at trial. Pursuant to Rule 7 Governing §2254 Cases, "the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition." Application of this provision is to be "'motivated by a responsible concern

that it provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history.'" *McNair v. Haley*, 97 F.Supp.2d 1270, 1284 (M.D.Ala. 2000), *quoting Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

As the Supreme Court has explained on the closely related issue of discovery in habeas proceedings:

> where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

Harris v. Nelson, 394 U.S. 286, 300 (1969); *see Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

Pursuant to 28 U.S.C. §2254(e)(1), factual findings issued by the state courts which relate to petitioner's claims shall be presumed correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. The state court's finding that Eckstein made reference to "murder[ing]" his wife on one of the tapes is just such a finding. *See Mendiola v. Schomig*, 224 F.3d 589 (7th Cir. 2000).

However, "[d]eference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

Eckstein was entitled to challenge the erroneous factual finding which formed

the basis for the state court's decision denying him relief, and he was entitled to use the state court record to demonstrate that point. He did not ask to expand the record to include anything that was not already before the state courts. The District Court accordingly abused its discretion in refusing him that opportunity.

The abuse is all the more apparent because, like the state Court of Appeals, the District Court chose to rely on the erroneous reference to "murder" in denying Eckstein relief, while refusing to expand the record to include the actual tapes which would have demonstrated the error.

The denial of Eckstein's motion to expand the record denied him a fair opportunity to demonstrate that the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). Eckstein accordingly is entitled to reversal of the order denying his habeas petition and remand with directions that the District Court (1) grant the requested expansion of the record and (2) reconsider Eckstein's petition in light of the expanded record.

CONCLUSION

For these reasons, Joseph Eckstein respectfully asks that the Court reverse the judgment below and either (1) grant the requested writ of habeas corpus or (2) remand with directions that the district court grant expansion of the record and reconsider Eckstein's petition in light of the expanded record.

Dated at Milwaukee, Wisconsin, August 15, 2005.

Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 13,019 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

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Robert R. Henak

TABLE OF CONTENTS TO APPELLANT'S APPENDIX

CIRCUIT RULE 30(c) STATEMENT

The items required by Circuit Rule 30(a) & (b) have been bound with appellant's brief.

Robert R. Henak

CIRCUIT RULE 31 STATEMENT

The materials contained in Eckstein's appendix are not available in non-scanned PDF format.

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2005, I caused 15 hard copies of the Brief and Appendix of Petitioner-Appellant Joseph Eckstein to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document and one copy of the brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AAG Daniel J. O'Brien, P.O. Box 7857, Madison, WI 53707-7857.

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